seized were at the time of seizure in possession of the judgment debtor, possession being prima facie evidence of title. If, however, the claimant was in possession at the seizure the burden of proof may be upon the execution creditor thus reversing the ordinary rule and the execution creditor may be made plaintiff. I was of the opinion that it is actually for the execution creditor here to prove that the judgment debtor was the actual lawful owners of the goods attached but which they had failed to do. In any case, it was my view that based on the evidence taken before the senior assistant registrar, the affidavits averred and authorities cited, the claimant had in fact and in law succeeded in establishing that they were the actual lawful owners of the attached property seized on the premises.

In the circumstances, I was satisfied that the claimant had been lawfully incorporated and was clearly a separate legal entity from the defendant on 14 April 1987, that it had been the tenant on the said premises from 1 May 1987 at $1,900 rental per month and that the goods attached on the premises were theirs. As such, I allowed the appeal against the senior assistant registrar's decision with costs.

However, having given the plaintiff leave to appeal, I allowed the stay as regards the release of the goods attached to the claimant to maintain the status quo of the parties pending the disposal of the appeal to the Supreme Court in view of the fact that should the appeal succeed, the plaintiff might not be able to obtain the fruits of this litigation whereas being a bank, it was in a position to secure the payment of all costs and expenses incurred by the claimant together with damages to be sustained by the stay up to the date of disposal of the Supreme Court appeal should that appeal fail. I was of the view that irreparable injury might result to the plaintiff if the stay was refused and the condition set by granting the stay would compensate the claimant if the plaintiff's appeal was dismissed subsequently. I also advised the parties to prepare the records for the appeal expeditiously to cut down expenses.

Appeal allowed.

Solicitors: *SA Lingam & Co*; *Lim Seong Chun & Co.*

Reported by *Wong Kim Fatt*

Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-1052-86
VC GEORGE J
14 JUNE 1988

Civil Procedure – Summary judgment – Appeal against – Foreign law contention not pleaded by defendants in statement of defence – Whether defendants can raise defences over and above those pleaded in statement of defence at O 14 proceedings – Rules of the High Court 1980, O 14 r 4(1)

The plaintiffs and defendants were stockbrokers in Singapore and Kuala Lumpur respectively. Pursuant to a contract note, apparently issued in Singapore, the plaintiffs delivered to the defendants 800,000 shares in a company whose shares were quoted on the Singapore Stock Exchange. The defendants accepted delivery of the shares and made two payments towards the purchase price, leaving a balance still to be paid. The plaintiffs claimed against the defendants for that amount and filed an application for summary judgment. The senior assistant registrar allowed the plaintiffs' application and the defendants appealed against this decision of the senior assistant registrar.

At the appeal, the defendants sought to rely on a further point which had not been pleaded in the statement of defence, namely, that the law governing the contract in which the suit was based was Singapore law and that accordingly the matter was not suitable for disposal summarily. The plaintiffs objected to the defendants' reliance on this point on the ground that the point had not been pleaded in the statement of defence.

Held, allowing the appeal:

(1) The plaintiffs' objection to the defendants' reliance on the foreign law point is misconceived. No doubt a defendant is bound by the four corners of his pleadings at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

(2) There are far too many questions to be dealt with in this matter, some of which are difficult questions of law. One such question is whether Singapore law applies. If it does, then that alone provides sufficient cause to deny the plaintiffs summary judgment. The O 14 judgment is set aside and the defendants given unconditional leave to defend.

Cases referred to

1 *The Western National Bank of New York* v *Perez, Triana & Co* (1890) 6 TLR 366 (refd)
2 *Lin Securities (Pte)* v *OSK & Partners Sdn Bhd* [1987] 2 MLJ 568 (distd)
3 *Ertel Bieber* v *Rio Tinto Co Ltd* 118 LT 181 (refd)
4 *Lloyd* v *Guibert & Ors* (1865) 1 LRQB 115 (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 4(1)

JS Gill for the defendants/appellants.
SM Yoong for the plaintiffs/respondents.

Cur Adv Vult

VC George J: Pursuant to an agreement, evidenced by a contract note dated 6 November 1985, between the plaintiffs and the defendants each of whom were stocks and shares brokers in Singapore and Kuala Lumpur respectively, the plaintiffs delivered to the defendants 800,000 shares in a company called Grand United Holding Ltd ('GUH') whose shares were quoted on the Singapore Stock Exchange. The agreed purchase price of the shares at Singapore dollars one point seven one (S$1.710) per share amounted to S$1,368,000. The defendants accepted delivery of the 800,000 shares and made two payments towards the purchase price leaving a balance of S$760,940 still to be paid. The plaintiffs' claim is for that amount, interest and costs.

By the terms of the contract, as seen on the face of the contract note which apparently was issued in Singapore by the Singapore plaintiffs on 6 November 1985, the plaintiffs were to obtain 2,000,000 GUH shares for the defendants for S$3,420,000, ie at $1.710 per share and it was agreed that the delivery date for the shares be 20 December 1985.

The defendants filed a statement of defence and counterclaim. They contend by the statement of defence, inter alia, that the contract is void in that it was illegal or against public policy or is in any event unenforceable. There were other defences which were apparently not relied upon either at the O 14 proceedings or in this appeal from the O 14 judgment. At the hearing of the O 14 summons, counsel for the defendants apparently had taken up a further point which had not been pleaded in the statement of defence, namely, that the law governing the contract in which the suit was based was Singapore law and that accordingly the matter was in any event not suitable for disposal summarily. The learned senior assistant registrar disagreed with the submission made on behalf of the defendants and gave the summary judgment. The matter before me is the defendants' appeal from that order.

Before me Encik Jagjit Singh Gill, counsel for the defendants, again sought to rely on the foreign law point. The objection of Cik SM Yoong for the plaintiffs, on the reliance on this on the grounds that that point had not been pleaded in the statement of defence, is misconceived. No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

The defendants relied on affidavits sworn by one of its directors, one Noorjehan Rahima bte Abdul Hamid Jumat. She says that the contract is a forward contract and contends that as such it is illegal or against public policy or in any event unenforceable. She says that on 5 December 1985 all trading on GUH shares were suspended by both the Singapore and the Kuala Lumpur Stock Exchanges and that such suspension had not been lifted when the writ was caused to be issued. Apparently the defendants are also relying on certain directives alleged to have been made by the Singapore Stock Exchange for evidence of which the said Noorjehan Rahima purported to rely on what was said to be two press releases said to have been made one by the chief executive of the Singapore Stock Exchange and the other by its general manager. The first of these releases appear to be dated 2 December 1985 and is to the effect that trading will be suspended with effect from 2 December 1985 until further notice with a proviso that 'delivery and payment in respect of previous contract entered into by member firms with clients will continue'. The second is dated 4 December 1985. By it, members (presumably of the Stock Exchange), are advised that trading will resume on 5 December 1985 'on an immediate delivery basis'. It goes on to state that 'the following are to be strictly adhered to':

(1) sellling clients must deliver their scrips on the market day following the date of transaction;
(2) selling brokers must deliver to the clearing house on the second market day following the date of transaction, failing which buying-in will be effected;
(3) no contra deals are allowed;
(4) no off-market transactions are allowed;
(5) forward contracts are strictly prohibited.

Encik Jagjit Singh Gill contends that in effect these press releases show that by Singapore law, which he contends is the law relevant to the contract, inter alia, forward contracts and off-market transactions pertaining to stock market transactions were illegal. He contends that the contract on which the plaintiffs base their claim is an off-market transaction and is also a forward contract and as such on each count was illegal and accordingly void.

Encik Gill referred to para 14/3-4/11 of *The Supreme Court Practice 1985 ('White Book')* to submit that leave to defend should be given where a claim depends on foreign law. *The Western National Bank of New York* v *Perez, Triana & Co*[1] was relied on in the *White Book* in which case Lord Coleridge said that it was impossible for the court to try a question as to the law of New York on affidavits. *Dicey & Morris on the Conflict of Laws*, 10th Ed, refer to a number of cases at p 1209 to hold that 'it is now well settled that foreign law must in general be

proved by expert evidence'. Encik Gill also sought reliance on *Lin Securities (Pte)* v *OSK & Partners Sdn Bhd*[2] where the question arose as to whether Malaysian or Singapore law applied in respect of the contract on which the plaintiffs sued. Thean J refrained from expressing any opinion on that since he was of the view that that would be an issue to be tried at the trial. I agree with Cik SM Yoong of counsel for the plaintiffs that that expression of his view on the matter was made by Thean J obiter and has no direct relevance to the situation obtaining in the issues before this court in this appeal. But that case does teach that the question of whether foreign law applies or not could itself be an issue to be tried.

Cik Yoong also contended that there is a presumption that foreign law is identical to Malaysian law and that it was for the defendants to show that there was a difference between the laws of Malaysia and Singapore on the point. She cited *Ertel Bieber* v *Rio Tinto Co Ltd*[3] and *Lloyd* v *Guibert & Ors*[4] and also referred to 8 *Halsbury's Laws of England*, 4th Ed, pp 511/512 and Vol 36, pp 32/33.

As far as Malaysian law is concerned I am not aware that a forward contract or an off-market contract is illegal. But it was brought to the attention of the court without challenge that the Singapore Stock Exchange had released a directive to the effect that such contracts are prohibited. If that prohibition has the weight of law in Singapore and if Singapore law is relevant then the presumption that Cik Yoong referred to if not unrebutted has certainly been watered down. Cik Yoong highlighted the proviso to the press release of 2 December 1985 but a further question that arises is the effect of that proviso in the face of the terms of the press release of 4 December 1985 – is the press release of 4 December to be read with that of 2 December or has the 4 December directive superseded the earlier? Cik Yoong also referred me to the effect of s 66 of our Contracts Act 1950. However, is that section relevant if the law to be applied is Singapore law?

I have anxiously and carefully gone over the submissions that were made by learned counsel as well as the cause papers again and again and have to conclude that there are far too many questions to be dealt with in this matter, some of which are difficult questions of law. One such question is whether Singapore law applies. If it does then that alone provides sufficient cause to deny the plaintiffs summary judgment. The appeal is allowed. The O 14 judgment is set aside. The defendants are given unconditional leave to defend.

Appeal allowed.

Solicitors: *Gill Cheah & Co*; *Shook Lin & Bok*.

Reported by *Ng Sheau Jiuan*

Bank Bumiputra Malaysia Bhd v Kredin Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C3843 OF 1985
VC GEORGE J
27 MAY 1988

Civil Procedure – Default judgment – Application to set aside – Defendant permitting default judgment to be entered on erroneous advice of solicitor – Whether an acceptable explanation – Whether O 14 r 11 of the Rules of the High Court 1980 can be successfully invoked – Rules of the High Court 1980, O 14 r 11

Civil Procedure – Default judgment – Application to set aside – Lapse of 14 months between date of default judgment and date of application to set aside – Application not entertained unless acceptable explanation for delay given

Civil Procedure – Default judgment – Application to set aside – No bona fide triable issues raised

Banking – Charge on land given as security for loan – Whether security a full and final recourse and indemnity in respect of loan – Whether guarantee given was ancillary to security – Terms of loan agreement and letter of guarantee to be looked at

The plaintiff claimed against the first defendant in respect of a loan made to it by the plaintiff and against the second defendant as guarantor of the first defendant. On 23 January 1986, the day of the hearing, both the defendants and their solicitors, although served with the writ, were absent and the plaintiff obtained summary judgment against each of them. Subsequently, on 14 March 1987, the defendants filed their application under O 14 r 11 of the Rules of the High Court 1980 to have the judgments entered against them in their absence set aside. The defendants' explanation for their having allowed summary judgment to be entered against them without opposing it was that their then solicitors had advised them that they had no defence to the plaintiff's claim.

In the first part of the proposed statement of defence filed in support of their O 14 r 11 application the defendants contended that: (a) the plaintiff accepted a third party second charge on certain lands in Klang as a full and final recourse and indemnity in respect of the loan, (b) the second defendant's guarantee was ancillary to the security provided by the second charge, (c) the plaintiff had accepted the security in accord and satisfaction of the loan. The second part of the defence contended that it was harsh and unconscionable for the plaintiff to sue the defendants after having issued a National Land Code Form 16D notice. It was also submitted that as the first chargee of the lands in Klang had already foreclosed and obtained an order for sale, and the plaintiff had failed to take any further step to realize the security after having served their Form 16D notice, the plaintiff had lost the security and consequently the second defendant's guarantee was null and void.

Held, dismissing the application:

(1) Order 14 r 11 of the Rules of the High Court 1980 allows the court to set aside a judgment entered under O 14 given against a party who does not appear at the hearing. However, r 11 cannot be invoked successfully where the defendant had directed his mind to the application and had deliberately decided to allow summary judgment to be taken against him. It is as if a consent judgment had been entered and unless a defendant can bring the matter more or less within the terms